

*United States Court of Appeals  
for the Second Circuit*



**BRIEF FOR  
APPELLANT**



76-1449

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M/S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

Appellee, :

Docket No. 76-1449

-vs-

CHARLES P. GPEZO, JOSEPH D'AGOSTINO,  
SAMUEL EBARE and RICHARD MICHAEL BEACH, :

Defendants-Appellants. :

ON APPEAL FROM THE UNITED  
STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF  
NEW YORK

BRIEF FOR APPELLANT - GREZO

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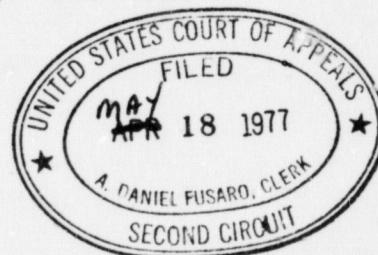


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UNITED STATES OF AMERICA, :

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PRELIMINARY STATEMENT

This appellant, Charles P. Grezo, the appellants Samuel L. Ebare, Joseph T. D'Agostino, Richard Michael Beach and the two defendants, Louis M. Camerano and Raymond Czerwinski, who have not appealed their convictions, were charged in an indictment with violating the federal gambling statute, §1955 of Title 18, United States Code, making it a federal offense for five or more persons to conduct an illegal gambling business, and with conspiracy to violate §1955.

Additionally the appellants, Joseph D'Agostino, Charles P. Grezo and the defendant Louis M. Camerano were charged in three additional counts contained in the indictment with violating §1952 of Title 18, United States Code, making it a federal offense to use a facility in interstate commerce to disseminate sports line and betting information with the intent

to promote, manage, establish, carry on and facilitate the conduct of an illegal gambling business in violation of §1955.

After a jury trial before the Honorable Lloyd F. MacMahon, Jr., and a jury in the Northern District of New York, this appellant Charles P. Grezo was convicted of the substantive count of violating §1955 but acquitted of conspiracy and acquitted of each count charging him with aiding and abetting D'Agostino and Camerano in the violation of §1952.

Appellants Ebare and D'Agostino were convicted of both the substantive violation of §1955 and of conspiracy, as was the defendant Czerwinski. Appellant D'Agostino was additionally convicted of violating §1952 as was the defendant Camerano who was also convicted of conspiracy but acquitted of the substantive gambling violation. The appellant Beach was convicted of the substantive violation but acquitted of conspiracy.

On September 17, 1976, the appellant was sentenced to serve six months in prison and fined the sum of Five Thousand Dollars.

This appeal by the defendant Grezo was seasonably filed by the filing of a Notice of Appeal on September 21, 1976. At the time the appeal was filed appropriate notice was sent to the court reporters who stenographically recorded the trial proceedings. This Court on application of defendant Grezo amended its order several times directing the filing of briefs and appendix because of the inability of the defendant Grezo to prepare the same without the trial transcript. After being advised that this Court would not grant further amendments, the defendant

Grezo is complying with this Court's last scheduling order notwithstanding that he still is without the advantage of the trial transcript. At the time of the writing of this brief, the trial transcript has still not been filed despite the urgings of counsel, the number of which are too numerous to mention. Consequently, defendant begs this Court's forgiveness for not being able to paginate his brief with appropriate references to the trial transcript.

If and when the trial transcript is received by defendant Grezo and if time permits before oral argument, defendant Grezo will attempt to file a supplemental brief containing any additional arguments that such transcript may reveal after review by counsel.

QUESTIONS PRESENTED

1. Did the government disprove beyond a reasonable doubt that Grezo was not a bettor?

and

2. Assuming that the government did prove beyond a reasonable doubt that Grezo was a bookmaker, did the government prove beyond a reasonable doubt that Grezo conducted the Ebare-D'Agostino gambling business and was not an independent bookmaker merely conducting his own business?

3. Did the trial court err in charging the jury that a bookmaker conducts and participates in the operation

of another bookmaker's business when he systematically transfers to the latter a substantial amount of his own independent business?

4. Did the trial court err in rejecting defendant's request to charge his theory of defense?

5. If this Court reverses the conviction of Beach for insufficiency, should the convictions of all other appellants be reversed?

#### STATEMENT OF FACTS

The defendant Grezo was convicted of the substantive offense of conducting, financing, managing, supervising, directing or owning a gambling business from September 1, 1973 to June 26, 1975, that was in violation of the law of New York, involved five or more persons, and had a gross revenue of more than \$2000 on a single day.

A large part of the government's proofs against all defendants consisted of recorded conversations intercepted from Joseph D'Agostino's telephones located in Mattydale, New York. With regard to the defendant Grezo all the government's proof against him was based on his telephone conversations to D'Agostino at the latter's telephone. The government's proof tended to show that D'Agostino was a bookmaker who accepted bets on his telephone and that he did so as an agent for Samuel Ebare who owned and financed the gambling business operated

by D'Agostino.

The proof also tends to demonstrate that among the persons from whom D'Agostino accepted bets on various sporting events including basketball and football, Grezo's bets totalled the largest share. There was absolutely no proof that Grezo had ever accepted any bets from D'Agostino or that Grezo had ever received or was entitled to a commission or percentage of any monies that represented the amount of any bets he placed with D'Agostino. The proof also demonstrated that when Grezo lost he paid vigorish to D'Agostino and when he won D'Agostino paid Grezo just the amount bet.\* The government produced no witness to say that Grezo had ever accepted a bet from such witness or that Grezo had ever collected any monies from him for any bet made with Grezo. Before making his almost daily bets with D'Agostino, Grezo was always given the line by D'Agostino and Grezo was never heard to give any line information to D'Agostino.

The proof also additionally established that during the period from December 21, 1974 to January 12, 1975, when Grezo's conversations were intercepted, D'Agostino always owed substantial sums of money to Grezo for the bets he accepted

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\* "Vigorish" or "juice" is a device used by bookmakers to attempt to insure a profit in the long run even if they lose as many bets as they win. Usually bookmakers require a bettor to wager \$1.10 to win \$1.00 in effect requiring a bettor to lay odds at 11 to 10. "Vigorish" is not collected on winning bets. For example, if a person bets \$100 on a team and the team loses, he is obliged to pay \$110 to the bookmaker; if the team wins, however, the bettor receives only \$100. United States v. Leon, 534 F 2d 667, (6th Cir., 1976).

from Grezo. The proof also tended to demonstrate that Grezo was free to place his bets with any bookmaker, other than D'Agostino and that Grezo shopped around and had access to other bookmakers for a line\* most favorable to him; that Grezo frequently argued with D'Agostino about D'Agostino's line in an effort to make a bet on a particular sporting event with an edge most favorable to Grezo. There was proof that Grezo in betting with D'Agostino was doing so in order to catch the "middle"\*\* and that D'Agostino knew of this frequent attempt by Grezo.

That although, as was previously stated, Grezo's

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\* A "line" is an addition to or subtraction from the anticipated point scoring potential of each of the two participating teams which is designated to equalize the betting propositions and thereby induce the placement of bets by customers on both teams, United States v. Schaefer, 510 F 2d 1037 (8th Cir., 1975).

A "line" constitutes the "odds" or "handicaps" or "point spreads" on the wagered contests. This is a list of the teams and events with a certain number of points attributed to the non-favored team. To win a bet on the favored team, therefore, that team must win by a score exceeding the point spread given to the non-favored team. The "line" is subject to change as a given event approaches and a bookmaker may alter the "line" on a particular event in order to try and even out the money wagered on each side, United States v. Guzek, 527 F 2d 552 (8th Cir., 1975).

\*\* When two bookmakers offer a significantly different point spread on an event, this offers bettors an opportunity for a "middle" - two bets placed on different teams with two bookmakers which together could not lose more than 10% of one of the bets. If the actual point difference were in the middle (between the odds set by each bookmaker) a bettor would win both bets, United States v. Box, 530 F 2d 1258 (5th Cir., 1976).

For example, if Grezo bet on the Super Bowl by betting on Pittsburgh -2 with bookmaker A, and bet on Pittsburgh's opponent, Minnesota +3, +3 1/2 with D'Agostino, Grezo could win his bet with bookmaker A and one of his two bets with D'Agostino if Pittsburgh actually won the game by three points.

bets with D'Agostino were substantial in relation to some of the other bets accepted by D'Agostino from others, the proof demonstrated that the regularity with which Grezo bet D'Agostino was only matched by the consistency in the amount of monies that Grezo wagered on each sporting event.

The government's expert on gambling, Special Agent Holmes of the F.B.I., testified that it was his opinion that Ebare financed the gambling business, that D'Agostino operated the business by accepting bets. He also testified that Beach was a collector and writer for the business, as was Czerwinski; and that Camerano conducted the business by supplying D'Agostino with "line" information.

With respect to Grezo, Holmes could not give an opinion with respect to Grezo's precise participation in the gambling business except to say that the intercepted conversations of Grezo indicated that he (Grezo) was "conceivably that of a writer or bookmaker -- but more than a mere bettor."

On cross examination of the government's expert he admitted that the volume or amount of bets placed by a person with a bookmaker, is no indication that such person conducts or participates in the gambling business which accepts his bets. Holmes also testified that although a bookmaker will lay-off\*

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\* A lay-off bet occurs when a bookmaker accepts a bet and then rebets the money with another bookmaker. United States v. Leon, supra. A "lay-off" is a bet or wager placed by one bookmaker with another bookmaker which is necessitated by the influx of an imbalance of bets and wagers on a given sporting event and which has the effect of distributing the said bets and wagers, thus minimizing the risk of substantial loss.

some of his bets with another bookmaker in order to minimize his risk and balance his books, it would not be a good business practice for a bookmaker to transfer to another bookmaker bets the former received on a large number of different sporting events, especially when the amount of the bets transferred are all for an equal or near equal amount of money. Holmes' basis for such an opinion was that a bookmaker's acceptance of bets on a number of different sporting events, together with the vigorish, insures the very balance that he wishes to achieve without laying off or transferring those bets to another bookmaker. It is only when his books are substantially out of balance on one or two particular contests, that the bookmaker is urged to transfer to another bookmaker.

Although Holmes testified that it would not be a profitable practice for a mere bettor to bet the same amount of money on a number of different sports events because even if a bettor wins as many bets as he loses, the bettor will lose to the extent of the vigorish he must pay on the losing bets. However, Holmes did admit that such a bettor could profit from betting on a number of different sports contests, if with respect to those bets, the bettor correspondingly bet the other side of the contest with another bookmaker in an effort to catch a "middle". That with a disparity in point spreads between two bookmakers, the bettor could win both bets.\* For

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\* Holmes further testified that "line" disparity among bookmakers frequently occurs because of the need to adjust their respective "lines" as an inducement to bettors to bet on the side of a particular contest on which the bookmaker has the least money wagers. Adjusting line is necessary to achieve the balance desired between the wagers bet on a particular contest.

example, if a bettor wagered \$100 on ten different contest with one bookmaker and won five and lost five, the bettor would lose \$50; and if the same bettor placed similar monetary bets with another bookmaker by betting the opposite side of the contest, the bettor would lose \$100. But if the bettor won both sides of just one contest, the bettor would win more than his total vigorish loss and thus earn a profit, the magnitude of which would increase as the number of successful "middle" bets increased. The following is an abstract of the composite transcript reflecting Grezo's intercepted conversations with D'Agostino.

SUMMARY OF CONVERSATIONS BETWEEN  
GREZO AND D'AGOSTINO BETWEEN  
DECEMBER 21, 1974 AND JANUARY 11, 1975

(Numbers in parentheses refer to page numbers of composite transcript prepared by government and introduced in evidence.)

12/21/74 - 5:50 p.m.

Grezo calls D'Agostino and receives the line from D'Agostino on twenty-seven sporting events scheduled that evening. D'Agostino tells Grezo that Grezo can really hurt him (D'Agostino) tonight\* but challenges Grezo anyway.\*\*

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\* (C-128) D'Agostino: Sure, you could really f--- me tonight.

\*\* D'Agostino: You ain't gonna anyway.

Included in the twenty-seven sporting events on which D'Agostino gave Grezo the line were seven professional basketball events. Before giving the line on these events, D'Agostino expressed a reluctance to do so and informs Grezo that he (Grezo) will not be able to secure such a line from any other bookmaker.\*

12/21/74 - 7:15 p.m.

Grezo calls D'Agostino and places eight bets on eight different sporting events at \$200 each with D'Agostino. Grezo also placed four bets at \$300 each on four different sporting events.

During the conversation and before Grezo placed these bets, D'Agostino indicates to Grezo that the former is aware of Grezo's access to the lines of other bookmakers and therefore that he (D'Agostino) knows which sporting events that Grezo is about to bet on.\*\*

In the conversation D'Agostino indicates to Grezo that Grezo has been winning on the bets placed with D'Agostino and again challenges Grezo by indicating that Grezo's good fortune

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\* (C-130) D'Agostino: Ain't got no pros.

Grezo: No, s---.

D'Agostino: You ain't gonna get any where you call anyway.

\*\* (C-131) D'Agostino: Ya want me to tell you what you want.

xxx

Grezo: All right. Give me uh Notre Dame. 13 1/2  
13. Ya didn't think I was coming with  
that one did ya?

D'Agostino: I don't care.

will not last long.\*

When D'Agostino informs Grezo that another bookmaker had the Tennessee-Missouri game at Tennessee -7, Grezo immediately bets on Tennessee's opponent, Missouri at +8 1/2 for \$200.\*\*

12/22/74 - 12:31 p.m.

D'Agostino informs Grezo that Grezo has been winning and informs Grezo how much he won the day before.\*\*\*

Additionally in this conversation D'Agostino expresses the fact that his bookmaking business will make a profit if the football contest involving the Buffalo Bills ends with Buffalo winning. In this connection he informs Grezo, who has bet on Buffalo, that he hopes Grezo wins this bet. Obviously D'Agostino has accepted more wagers from bettors who have bet on Buffalo's opponent that he has from those bettors who bet

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\* (C-132) D'Agostino: You may not win 'em every night  
ya know.

Grezo: I know.

\*\* (C-132) Grezo: Eh, let's see, uh, (mumbles) and that's my story, what's the matter with that?  
D'Agostino: O.K. You want me to tell ya the difference.

xxx

Grezo: All right, wait a minute, I ain't done yet, wait a minute, where is it. Missouri plus 8 1/2 and 8, buck each.

D'Agostino: Yeah see? Oh, good thing I lowered that.

\*\*\* (C-136) D'Agostino: Well, here's your basket figure, 1940 half.

xxx

D'Agostino: Right you won 390.

that Buffalo would win. Grezo who has bet on Buffalo, is encouraged by D'Agostino.\*

12/23/74 - 6:21 p.m.

D'Agostino tells Grezo how much money he is winning from D'Agostino's gambling business.\*\* He also informs Grezo of the monetary limit for each bet that Grezo elects to place with D'Agostino on this day.\*\*\* D'Agostino then gives Grezo the line on fifteen sporting contests.

12/23/74 - 6:46 p.m.

In the conversation at 6:21 p.m. D'Agostino indicated his line on Milwaukee was -7.\*\*\*\* In this conversation Grezo indicates his access to the lines of other bookmakers. Apparently another bookmaker had the line at -5 on Milwaukee. Grezo informs D'Agostino of this line difference and advises D'Agostino to lower the odds on Milwaukee; however, Grezo in exchange for this information, is able to bet on Milwaukee's opponent, Washington, at +7 with D'Agostino, a much better wager for

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\* (C-136) Grezo: Well, do you need today. Pittsburgh or Buffalo.

D'Agostino: Buffalo. I'm rooting for you.

xxx

(C-137) D'Agostino: Well the juice is liable to run wild.  
Grezo: I hope so. --

\*\* (C-138) D'Agostino: OK. Beautiful. 1820 and a dollar.  
Grezo: Yeah, yeah.

\*\*\* (C-138) D'Agostino: \$2 any way you can get it.  
Grezo: Any where I can get it at.

\*\*\*\* (C-139) D'Agostino: Milwaukee 7.

Grezo's financial interests.\*

D'Agostino is reluctant to accept Grezo's bet on Washington at +7 because D'Agostino heard that another bookmaker had the line at +2 1/2 and feels that there is too much of a difference in the line or odds. Grezo convinces D'Agostino to accept the bet by telling D'Agostino that the difference is really not five points but only two and one-half points.\*\*

Grezo then bets on nine additional separate sport contests at \$200 each.

12/26/74 - 6:11 p.m.

Grezo calls D'Agostino and asks for the line. D'Agostino gives the line on twenty-four different sporting contests. Additionally D'Agostino explains to Grezo what the odds are on each of four professional football teams to win the Super Bowl. Grezo tells D'Agostino he does not want to bet on any of these teams because he doesn't like the odds offered by D'Agostino's

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\* (C-140) Grezo: All right, I got some advice for ya.

D'Agostino: Yeah, I know, Milwaukee?

Grezo: Yeah.

D'Agostino: I don't know if their right or wrong.

Grezo: Well, I'm going to give you \$2, and then take it off.

D'Agostino: Yeah.

Grezo: On Washington.

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\*\* (C-141) D'Agostino: Hey, that f---- jerk just told me Milwaukee, he said 2 1/2. Geez, that,

that doesn't seem right.

Grezo: Well, I, I, I couldn't, cause I see him but I seen the right guy said 5.

D'Agostino: That sounds about right.

man.\*

In this conversation Grezo becomes aware of the fact that he lost the opportunity to bet on at least two sporting events offered by D'Agostino at odds more favorable to Grezo.\*\*

Also in this conversation D'Agostino informs Grezo of a change in the line for Minnesota. Grezo resists making a bet on the sporting event involving Minnesota unless D'Agostino agrees to make the bet with Grezo at the old line, a line more beneficial to a bettor.\*\*\*

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\* (C-144) D'Agostino: Pittsburgh's 3 to 1.

xxx

D'Agostino: Oakland's even money.

xxx

D'Agostino: Minnesota 2 to 1.

xxx

D'Agostino: L A 4 to 1.

D'Agostino: That's the wa' they line up.

xxx

Grezo: They're crazy, - I never heard of such a line.

\*\* (C-144) D'Agostino: Oklahoma State went to 12.

Grezo: No kidding.

D'Agostino: Yeah, I know, you forgot to give it to me huh?

Grezo: Yeah, how'd you know?

xxx

D'Agostino: Penn State up to 4.

xxx

(C-145) D'Agostino: You forgot that, huh?

Grezo: Yeah.

\*\*\* (C-144) D'Agostino: All right here. Minnesota went up to 5 but I'm gonna just go to 4 1/2 with it.

Grezo: I need 4 1/2 yeah.

(C-145) Grezo: Minnesota, I was - . You gotta give the old line on Minne.

D'Agostino: I can't give ya 3 1/2.

Grezo: Yeah, 3 1/2 and 4.

12/26/74 - 7:15 p.m.

In spite of the fact that at 6:11 p.m. on December 26, 1974 D'Agostino gave Grezo the line on twenty-four different basketball sporting events, Grezo during this conversation bets on only four of those events. And because of this fact D'Agostino is disappointed with Grezo and tells Grezo that the reason Grezo is not betting more with him (D'Agostino) is because the line on these same events with other bookmakers is identical with D'Agostino's line and that this fact would prevent Grezo from betting the middle.\* \*\*

In this conversation D'Agostino reluctantly agrees to accept a bet for \$600. After accepting the same, he tells Grezo he cannot have any additional bets on that contest.\*\*\*

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\* Betting the "middle" is a device used by bettors to bet on a particular sporting event with two bookmakers and where, because of the difference in point spread, a bettor is able to bet on both teams. In this situation the most a bettor can lose is the percentage that he must pay the winning bookmaker; however, if the actual point spread appearing at the end of the contest should fall between the odds set by the two bookmakers, the bettor can win both bets.

\*\* (C-147) D'Agostino: Want baskets?  
Grezo: Yep. Three please.  
D'Agostino: Sure, f---- line is too close.

\*\*\* (C-147) Grezo: 5 1/2 and 6.  
D'Agostino: I don't blame you.  
Grezo: 3 each.  
D'Agostino: What three each?  
Grezo: I'm loaded.  
D'Agostino: All right.  
xxx  
D'Agostino: That's all, you're done with that game.

1/2/75 - 8:05 p.m.

Grezo receives the line from D'Agostino on twelve contests. D'Agostino tells Grezo he is winning \$3004 from D'Agostino's gambling business. Grezo asks D'Agostino if D'Agostino's boss is mad at Grezo because of the \$3005 he (the boss) owes Grezo.\*

D'Agostino asks Grezo if he (Grezo) wants to bet on the Super Bowl. That one team is -3, D'Agostino says. Grezo says I'll bet on Minnesota +3 for \$300 and +3 1/2 for \$300. D'Agostino says no but then agrees to accept 1/2 of Grezo's \$600 bet on Minnesota at +3 1/2. Grezo indicates he will cancel the bet with D'Agostino if Grezo can get another bookmaker to accept a Grezo bet on Minnesota at +4. D'Agostino tells Grezo he can't cancel and Grezo withdraws his bet with D'Agostino at +3 and +3 1/2 for \$300 at each line.\*\*

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\* (C-152) D'Agostino: No. 3005 your way.

xxx

Grezo: Yea. I'm saying but, oh, I mean, he ain't mad he owes me three?

D'Agostino: No.

\*\* (C-153) D'Agostino: OK, you won't to take a little lead with the Super Bowl?

Grezo: What is it?

D'Agostino: Three.

Grezo: All right. Give me the short with ...

D'Agostino: No. its three.

xxx

Grezo: Three, three make it.

xxx

D'Agostino: Should have given it to you 2 1/2.

Grezo: You should of, wouldn't of got nothing.

D'Agostino: What?

Grezo: It's, its four out I heard.

D'Agostino: No it ain't.

xxx

Grezo: All right.

D'Agostino: Minnesota plus 3 1/2. Minnesota plus three -

Grezo: For three

D'Agostino: You can't cancel now either.

xxx

Grezo: If I can reach four I'm gonna cancel it.

1/3/75 - 6:08 p.m.

D'Agostino tells Grezo that his (D'Agostino's) computations of the results from the day before confirm the fact that Grezo won three out of three bets placed with D'Agostino.

D'Agostino then gives Grezo the line on sixteen sporting events and tells Grezo he can't bet \$500 per event but only \$300.

There is more discussion in this conversation relating to Grezo's negotiation for better odds on the Super Bowl.

1/3/75 - 7:01 p.m.

Grezo calls D'Agostino and places seven bets at \$300 each and relating to the line given to him at 6:08.

1/4/75 - 11:44 a.m.

Grezo called D'Agostino for the line. D'Agostino expresses his elation at having beaten Grezo on the Houston bet the day before and Grezo responds by demonstrating his own frustration.\*

1/4/74 - 12:36 p.m.

D'Agostino gives Grezo his bottom figure.\*\* D'Agostino

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\* (C-161) D'Agostino: What did Houston do?  
Grezo: Houston lose.  
D'Agostino: Well beat ya then.  
Grezo: Oh what you pop your nuts, now, ya gonna give yourself a h---- job.

\*\* This is the amount owed by or to the bookmaker and which figure is based on prior wins and losses by the bettor. Betting transactions are customarily on credit, and the bettor and the bookmaker meet, perhaps once a week, to "settle up" on the "figures," a term that refers to the amount of money owed by one to the other. United States v. Leon, 534 F 2d 667 (6th Cir., 1976).

gives Grezo the line on fourteen sporting events.

1/4/75 - 12:55 p.m.

Grezo calls and bets \$300 on each of five sporting events and \$450 on another when he chooses Notre Dame with 12, 12 1/2 points. (Three hundred dollars on Notre Dame with twelve points and one hundred and fifty dollars on Notre Dame with twelve and one-half points.) When D'Agostino begins to demonstrate reluctance to accept more than \$300 on Notre Dame, Grezo is able to get D'Agostino to accept another \$100 by telling him "I'm getting all Notre Dame.\*

1/4/75 - 1:14 p.m.

Grezo begs D'Agostino to take at least another \$100 bet on Notre Dame. D'Agostino at first says no but agrees to accept \$50 more when Grezo tells him he's jammed too on the Notre Dame game. (C-166) Grezo bets. Then based on the line given to him by D'Agostino at 12:36, Grezo bets five more separate sporting events at \$300 on each event.

---

\* (C-164) Grezo: Notre Dame 12 1/2 and 12. Buck and a half each.

xxx

Grezo: Another buck at 12.

D'Agostino: What?

Grezo: I'm getting all Notre Dame.

D'Agostino: So, what do ya want me to tell ya?

Grezo: Give me another buck at 12. The right line. 12. That was a buck and a half and 2 1/2.

xxx

Grezo: Total of uh , 4, all right, yeah all right.

1/4/75 - 6:24 p.m.

At the time of this call the results of Grezo's prior bets on January 4, 1975 with D'Agostino are known and D'Agostino complains to Grezo that he (Grezo) won a substantial amount of money. In an effort to mollify D'Agostino, who threatens not to accept any more bets from Grezo, Grezo tells D'Agostino that he lost, too.\*

D'Agostino then gives Grezo the line on twenty-eight games scheduled for the evening of January 4, 1975 and later acknowledges that Grezo beat D'Agostino for \$1000 for bets placed by Grezo with D'Agostino thus far on January 4, 1975.

1/4/75 - 7:01 p.m.

This conversation indicates D'Agostino is still angry at Grezo for winning so much money on January 4, 1975. Grezo then places seven bets for \$200 on seven different contests. He places twelve bets for \$300 on twelve different contests. These bets are based on the line given to him by D'Agostino at 6:24 p.m. on January 4, 1975.

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\* (C-168) D'Agostino: Yeah, you f---- slaughtered me today, you know that? Again. I ain't got a f---- chance.

xxx

D'Agostino: We would uh won a dime [\$1000] today, he already owes at 25, I don't know how far he wants to go.

Grezo: Notre Dame, what'd my gonna do? You give me the line that Notre Dame is nothing. Everybody had it with me, what's the matter with you?

1/4/75 - 7:40 p.m.

Grezo calls D'Agostino and adds to the amount wagered on two of his prior bets with D'Agostino. Grezo tells D'Agostino at this time: "F---, they're allbettin the same games here."

(C-175)

1/5/75 - 12:21 p.m.

D'Agostino informs Grezo that D'Agostino's gambling business owes Grezo \$4315 up to January 5, 1975.\*

1/5/75 - 12:51 p.m.

D'Agostino gives Grezo the line of five basketball contests and Grezo bets on the North-South football game by betting \$100 on the North at -1. Grezo wants to bet \$200 but D'Agostino resists the extra wager. Using this line that D'Agostino had just given Grezo, Grezo bets on New Orleans +13 1/2 and +13 for \$100 each.

This conversation indicates that D'Agostino is attempting to limit Grezo on the amount he can bet on a particular sporting event. It appears that this is so because of the money already owed to Grezo.\*\*

1/5/75 - 1:49 p.m.

In this conversation Grezo bets \$300 on Chicago. D'Agostino

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\* (C-177) Grezo: Do you got 43, 15 and 3.  
D'Agostino: Right.

\*\* (C-180) Grezo: That's why I want to give you a deuce.  
D'Agostino: No, I oh, let me have a buck, gees,  
if I was out front I wouldn't care, you--

tells him he can bet more if Grezo wants to because D'Agostino has accepted more money on Milwaukee, Chicago's opponent and therefore, his (D'Agostino's) books are out of balance more than he would like on this particular event.

1/6/75 - 6:44 p.m.

D'Agostino reports to Grezo that Grezo's bottom figure is now \$3415 after Grezo has been paid \$1500. D'Agostino then gives Grezo the line on thirteen sporting events.

1/6/75 - 7:03 p.m.

Based on the line given on January 6, 1975, Grezo bets D'Agostino on six different sporting events, three are at \$300 each and three are at \$200 each.

1/7/75 - 6:22 p.m.

D'Agostino gave Grezo the line on ten separate sports events. D'Agostino and Grezo finish the conversation by discussing the number of bets Grezo won as opposed to those bets he lost. The amount of Grezo's losses indicates he pays vigorish\* to D'Agostino when the teams he bets on against D'Agostino lose.

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\* Vigorish is the percentage, in this case 10%, that a bettor pays to the bookmaker when the latter loses. This percentage is in addition to the amount of money bet. If therefore a bettor bets \$100 with a bookmaker and loses, he pays the latter a total of \$110 even though the bettor would receive only \$100 from the bookmaker if the bettor wins.

1/7/75 - 7:25 p.m.

Grezo calls D'Agostino and bets D'Agostino on three different sporting events, \$300 on each event.

1/11/75 - 12:35 p.m.

D'Agostino gives Grezo the line on nine sports events to be played that afternoon.

1/11/75 - 1:06 p.m.

Grezo bets on one sports event for \$200.

1/11/75 - 1:31 p.m.

Grezo bets on five separate sports events, three at \$300 each and two at \$200 each. With respect to one of the bets for \$300, Grezo tries to bet \$400, but D'Agostino refuses to accept more than \$300.\*

1/11/75 - 6:38 p.m.

Grezo receives the line from D'Agostino on thirty-nine separate sporting events.

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\* (C-193) Grezo: Oh, Loyola Chicago.

D'Agostino: Yea.

Grezo: 7 1/2 and 7.

D'Agostino: Plus 7 1/2 and plus 7. Yea.

Grezo: Can have two each.

D'Agostino: No. 1 1/2.

Grezo: You need it.

D'Agostino: 1 1/2.

Grezo: 1 1/2.

1/11/75 - 7:31 p.m. and 7:45 p.m.

Based on the line given to Grezo at 6:38 p.m., Grezo bets on nine separate events at \$300 per bet and on five separate events at \$200 each and on two separate events at \$400 per sports event. During this conversation and before Grezo has completed giving D'Agostino all his bets, D'Agostino tells him to stop, D'Agostino has had enough.\*

In addition D'Agostino tells Grezo that he (Grezo) took advantage of another bookmaker with the Oklahoma City game.\*\*

Later in the conversation D'Agostino tells Grezo he should not take any more bets from Grezo.\*\*\*

1/11/75 - 7:45 p.m.

Grezo calls D'Agostino and asks him to cancel his previous

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\* (C-198) D'Agostino: That's enough.  
Grezo: Are you kidding?

\*\* (C-198) Grezo: Buck, ooh, Oky City 6 1/2 and 6, buck and a half.  
D'Agostino: Plus 6 1/2, plus 6, buck and a half  
                  XXX  
D'Agostino: You robbed that game pretty good.  
Grezo: Who?  
                  XXX  
D'Agostino: You robbed that game pretty good.  
Grezo: Wha-- Oky City?  
D'Agostino: Yeah.  
Grezo: What it come in?  
D'Agostino: I don't know what you got it, they  
                  got it five up there.  
Grezo: (laughs)

\*\*\* (C-199) D'Agostino: I shouldn't even of took nothing  
                  tonight.  
Grezo: I know. What are you gonna, what do you  
                  want me to say?  
D'Agostino: Let the guy have one winning week.

bet on Notre Dame. Grezo tries to add another \$200 to his prior bet on Oklahoma City; D'Agostino refuses but does accept another \$100.\*

#### POINT I

THE GOVERNMENT'S PROOF AS TO GREZO WAS INSUFFICIENT TO SUPPORT THE VERDICT IN THAT IT DID NOT OVERCOME GREZO'S DEFENSE BEYOND A REASONABLE DOUBT THAT HE WAS A BETTOR.

The government's proof against Grezo rested entirely on Grezo's telephone conversations with D'Agostino intercepted over the latter's telephone in Mattydale, New York between December 11, 1974 and January 11, 1975. These conversations relied upon by the government are adequately recounted in the composite stenographic transcript prepared by the government and received in evidence against all the defendants upon the trial of the indictment.

These transcripts demonstrate that almost on a daily basis Grezo called D'Agostino and received the "line." At subsequent to his receipt of the "line" Grezo bet either two hundred or three hundred dollars on a number of particular teams involved in a number of different sporting events relating to D'Agostino's "line." Occasionally Grezo added to the amount originally wagered.

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\* This was the same game upon which D'Agostino told Grezo previously that he took advantage of another bookmaker.

Agent Holmes, the government's gambling expert, opined that Grezo's participation in the Ebare-D'Agostino gambling business was "conceivably that of a writer or bookmaker - but more than a mere bettor." The expert did not point to any particular language contained in the transcript as the basis for his equivocal opinion and furthermore did not describe or classify any of Grezo's bets as lay-off bets. Notwithstanding this failure the government contended that Grezo's occasional remarks to the effect: "I'm loaded too" or "I'm jammed" proved beyond a reasonable doubt that Grezo was a bookmaker and not a bettor. The government, although disputed by its own expert on cross examination, contended that the magnitude and frequency of Grezo's bets with D'Agostino proved that Grezo was not a bettor.

In addition to the language contained in the transcripts which the government contended evidenced Grezo's conduct as a lay-off bookmaker, there was an abundance of conversation by Grezo from within these same transcripts that pointed to the inference that he was a bettor and not a bookmaker laying off to D'Agostino.

D'Agostino's statement at page C-130 informing Grezo "you ain't gonna get any where you call anyway" indicates Grezo's access to the line of other bookmakers. Agent Holmes stated that bettors have such access and frequently do shop around for the best "odds" for the purpose of wagering on "middles."

D'Agostino's statement at C-131 and 132: "You

may not win 'em every night ya know" is a clear indication that D'Agostino is aware of the line of the other bookmaker to which he knows Grezo has access and that therefore he can predict Grezo's wagers on this particular day. This access to other bookmakers, Agent Holmes admitted, is fundamental to a bettor playing the middle.

When at C-132 D'Agostino informs Grezo that another bookmaker had the line on Tennessee at -7, Grezo bets on Tennessee's opponent, Missouri, +8 and +8 1/2 with D'Agostino. This conduct points to Grezo as a bettor trying to catch a "middle" because if Grezo subsequently bet with the other bookmaker on Tennessee -7, Grezo could make a profit if the actual point spread fell on 8. If nothing else Grezo knew at this time that a bet on the underdog with D'Agostino was the best bet between the two bookmakers because in choosing Missouri with D'Agostino, Grezo received 1 1/2 more points. In this regard it is informative to the relationship between D'Agostino and Grezo that Grezo bet only after D'Agostino related the other line.

At C-136, D'Agostino informs Grezo that he is winning one thousand nine hundred forty dollars. This fact establishes that Grezo's betting relationship with D'Agostino was based on credit, an arrangement, according to the expert, consistent with Grezo being a bettor as well as a bookmaker.

The transcripts also establish that throughout the period December 21, 1974 to January 11, 1975, Grezo was substantially ahead of D'Agostino in monies owed to Grezo, a fact which would explain how it was that Grezo could bet so

much money each day with D'Agostino. Grezo was simply playing with D'Agostino's money.

At C-138 D'Agostino tells Grezo his limit is \$200 per contest. Holmes testified that bookmakers frequently place betting limits on bets they accept from bettors.

At C-144 Grezo informs D'Agostino that he is not going to bet with D'Agostino because D'Agostino's line is not attractive to Grezo. This option is available to all bettors and if Grezo was a bookmaker, accepting D'Agostino's line and passing it on to Grezo's customers, the "line" would pose no particular problem to Grezo's financial interests.

At C-144 and 145, D'Agostino taunts Grezo by informing him that D'Agostino increased the points that Grezo would have to give to D'Agostino if Grezo wanted to bet on Oklahoma State and Penn State. Here again the taunt by D'Agostino makes no sense if Grezo was a lay-off bookmaker desiring to transfer customers' bets on these two teams to D'Agostino. If a bookmaker, Grezo would merely pass on the higher odds to his customers. This conversation demonstrates that D'Agostino, by raising the odds, prevented Grezo from earning a personal profit.

C-117 contains a conversation between D'Agostino and Grezo which unequivocally establishes Grezo as a bettor, albeit, a professional bettor. When D'Agostino after receiving only three bets from Grezo chides Grezo by saying: Sure, f---- line is too close. This conversation can only mean that Grezo

is reluctant to wager with D'Agostino on numerous contests when he cannot, because of the lack of a suitable point spread between D'Agostino's line and the line of another bookmaker, bet both sides of the contest to succeed in winning on a "middle" bet.

At C-152 Grezo inquires of D'Agostino with respect to whether or not D'Agostino's boss is mad at Grezo because Grezo is winning so much money. If Grezo's relationship to D'Agostino was that of bookmaker and sub-bookmaker, D'Agostino's boss would appreciate the fact that the winnings were not the personal winnings of Grezo but the winnings of Grezo's customers, a known risk for every bookmaker dealing with his agent or sub-bookmaker.

At C-153, Grezo, but for the unfavorable odds, would have agreed to bet on the Super Bowl at a time when Grezo would not have, as yet, accepted any bets from customers. Here again, as is the option of any bettor, Grezo dislikes the odds and refuses to bet.

At C-161, D'Agostino is elated over finally having won a bet with Grezo and Grezo appears to be angry over D'Agostino's reaction. This demonstrates that this loss is Grezo's personal loss. If the previous day's bets, which included Houston, were lay-off bets, then Grezo's loss to D'Agostino would have been correspondingly off-set by the losses of Grezo's customers betting Houston that were not transferred to D'Agostino.

For example if Grezo's bet on Houston with D'Agostino was a lay-off wager, the very definition of lay-off implies that Grezo retained a certain amount of bets on Houston himself to balance the bets Grezo accepted on Houston's opponent. If Grezo lost with D'Agostino on Houston, then of necessity Grezo had to win those bets from his customers who bet on Houston. This conversation at C-161 demonstrates that when Grezo lost on Houston, the loss injured Grezo financially. There would be no personal financial loss to Grezo if Grezo's bet on Houston was a lay-off.

Finally and at C-198 Grezo's relationship to D'Agostino is again forcefully demonstrated when again Grezo's access to other bookmakers is acknowledged by D'Agostino. Strongly implied from this conversation is D'Agostino's awareness that Grezo is betting the middle again with D'Agostino and a second bookmaker.

Here Grezo has bet with D'Agostino on Oklahoma City, an underdog, and D'Agostino is accepting a bet from Grezo at +6 and a bet at +6 1/2. There is an indication that Grezo has already bet the other side of the same contest with another bookmaker by betting the favorite and giving up only five points. This is another example of Grezo attempting to catch a middle. If the contest ends with a point spread of 6, Grezo would win his bet with the other bookmaker, win 1/2 of his bet with D'Agostino and tie D'Agostino on the other half of his bet with D'Agostino.

The thread of cogency that runs throughout the D'Agostino-Grezo conversations is the adverse business interests that exist between D'Agostino and Grezo together with the awareness by D'Agostino that Grezo is using D'Agostino's "line" and comparing it with the line of other bookmakers in an effort to bet both sides of a given sports contest to achieve a personal advantage and profit.

While it is true as the government contends that some small portion of Grezo's language indicates that some bets were lay-off bets, there also exists the overwhelming inference that Grezo was betting merely for himself and not transferring bets of others to D'Agostino. In this unique situation where all the conversations were intercepted without the knowledge by either party, it would not be permissible to invoke the rule that a jury would be free to accept a portion of the evidence and reject another portion. Since these conversations are all part of the res gestae, the government should be bound by the inherent inconsistency in its own evidence. And where such inconsistency affects the very quality of its proof to the extent that a finding of guilty cannot be made, the defendant should be entitled to a judgment of acquittal.

Since as argued above the government's proof with respect to Grezo was all circumstantial and since the inference to be drawn from such evidence was at least as consistent with Grezo being a bettor as it was that he was a bookmaker, then Grezo's conviction under Title 18, U.S.C., §1955 should be reversed. (cf. United States v. Box, 530 F 2d 1258, 5th Cir.,

(1976)).

Counsel's recollection of his cross examination of Agent Holmes, the government's gambling expert, is that the testimony by Holmes concerning Grezo reinforces the defendant's present contention with respect to the quality and quality of evidence against Grezo. Holmes repeatedly admitted on cross examination that facts existed in the composite transcript that pointed to Grezo being a bettor just as strongly and compellingly as they pointed to Grezo being a bookmaker.

Such consistency between guilt and innocence was the reason Holmes stated that Grezo was "conceivably a bookmaker or conceivably a writer - but more than a bettor." While §1955 includes bookmakers and writers within its proscription, the section does not punish one for being suspected, as the term "conceivable" implies, of being a bookmaker or writer. If the government's own expert could not resolve precisely what relationship Grezo had with the Ebare-D'Agostino gambling business, it is impossible to understand how a jury could arrive at such a necessary finding beyond a reasonable doubt. The jury had no additional evidence to consider than what was available to Agent Holmes as an expert.

POINT II

ASSUMING THE EVIDENCE WAS SUFFICIENT TO DEMONSTRATE THAT GREZO WAS A BOOKMAKER, THE GOVERNMENT'S EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT GREZO PARTICIPATED IN THE EBARE-D'AGOSTINO GAMBLING BUSINESS AS ONE WHO CONDUCTED, FINANCED, MANAGED, SUPERVISED, DIRECTED OR OWNED SAID BUSINESS.

The government did not contend that Grezo managed, supervised, directed or owned the Ebare-D'Agostino gambling business. It was the government's contention that because Grezo was a bookmaker who laid-off bets to the Ebare-D'Agostino business on a consistent and on-going basis that such evidence was sufficient to establish his participation in conducting or financing the business of Ebare and D'Agostino.

The question now to be resolved, perhaps for the first time since the enactment of §1955 is whether a bookmaker who consistently transfers lay-off bets can be said to be conducting or financing the business of the bookmaker who accepts the former's lay-off bets.

In answering the question now to be resolved and in order to sustain the conviction against Grezo, the evidence must show a sufficient connection between Grezo and Ebare-D'Agostino to justify a jury finding that Grezo, together with Ebare and D'Agostino, conducted a single gambling business.

It is conceded that D'Agostino accepted Grezo's bets almost on a daily basis and that Grezo used the line

furnished to him by D'Agostino; however, it is Grezo's contention that even if these transactions with D'Agostino reflected the transfer to D'Agostino of bets received from Grezo's betting customers in order to minimize Grezo's financial risk of loss and thus insuring himself a daily profit realized from a "balanced book" that such fact alone is not sufficient to place Grezo in the category of one conducting or financing the Ebare'D'Agostino gambling business.

In this connection it is important to note that Grezo never accepted any bets from D'Agostino; nor did Grezo provide in any significant fashion any line information to D'Agostino.

In order to sustain Grezo's conviction under the theory that he was a bookmaker who laid-off bets to D'Agostino, the evidence must demonstrate an interdependence between the business of Grezo and the business of Ebare-D'Agostino. Both must therefore need each other's business expertise and depend upon each other for the success of their own respective illegal ventures. United States v. Guzek, 527 F 2d 552 (1975).

Where the dependence of one bookmaker upon another is unilateral, it cannot be said that the two are so welded together as to consist of a single business. Therefore the fact that Grezo depended upon D'Agostino to accept his lay-offs does not demonstrate the corresponding requisite dependence of D'Agostino on Grezo unless by agreement or prior arrangement D'Agostino has induced Grezo's commitment in some way to do

business only with D'Agostino. If the relationship between D'Agostino and Grezo appears to contemplate the same freedom of choice and options that earmarks the known relationship between a large bettor and his bookmaker, then it cannot be said that the necessary interdependence exists between two independent bookmakers who are both free to do business with each other or any other independent gambling business.

In examining the evidence present in an array of cases dealing with the independent bookmaker defense, it can be readily observed from the Court's rationale in those cases that the basis for the Court's ruling becomes the distinguishing factor and serves to demonstrate the independent relationship between Grezo and D'Agostino.

In United States v. Brick, 502 F 2d 219 (8th Cir., 1974) the Court found, in joining together multiple gambling businesses, that in addition to each receiving the line from and laying off to Singer, there was an agreement that each would receive 50% of any profits generated by the bets he relayed, and in addition, each was guaranteed the payment of any losses sustained in receiving the wagers.

In United States v. Thomas, 508 F 2d 1200 (8th Cir., 1974), three of the defendants had made some lay-off bets with the Wolk-Capra-Fishman book on a fairly regular basis and apparently also had received some lay-off bets from that book. In "Thomas" one of the defendants, Schullo, contended that he did not conduct Wolk's business even though he both accepted

and made lay-off bets from and to Wolk. The Court in deciding against chullo stated that in accepting lay-offs from Wolk, the jury could have found that Schullo assisted the Wolk operation in the balancing of its books on various athletic contests.

In United States v. Schaefer, 510 F 2d 1307 (8th Cir., 1975) the Court rejected the independent bookmaker defense because of the interdependence demonstrated from both the sharing of line information and the exchanging of profits facilitated by the exchange of lay-off bets.

In United States v. Guzek, 527 F 2d 522 (8th Cir., 1975) the Court rejected the independent bookmaker theory because as to Dietch, in addition to his being a bookmaker making bets to and receiving the line from the Fecht-Larsen gambling business, he received advice and instructions from Fecht with regard to changing his (Dietch's) point spread for his customers and with regard to how to operate his betting arrangements with customers.

As to Guzek, the Court in affirming his conviction found that in addition to Guzek being a bookmaker giving and accepting bets to and from the Fecht-Larsen book, that an agreement existed between Guzek and Fecht-Larsen to the effect that in exchange for all of Guzek's business, Fecht-Larsen would not demand immediate payment of monies owed by Guzek to Fecht-Larsen.

The following comments by the Court in "Guzek" serves to demonstrate the lack of the requisite interdependence

in the instant case. The Court said at p. 558:

"We observe, however, that without the recorded conversation of December 3rd (the agreement by Fecht-Larsen to forbear their right to immediate payment of an indebtedness owed by Guzek in exchange for the latter's business) suggesting a general business arrangement between Fecht-Larsen and Guzek, the evidence otherwise does not appear sufficient to bring Guzek within the network of the Fecht-Larsen gambling operation. For when an otherwise independent bookmaker such as Guzek makes layoff bets with another bookmaker such as Fecht-Larsen, the latter in effect re-insures the former's business and to that extent can be said to finance that business within §1955. This analysis applied here may serve to connect the Fecht-Larsen business to Guzek but not the converse." [Emphasis added]

The factors present in the above cases which demonstrate the requisite interdependence between bookmakers do not exist in the instant case. There did not exist between Grezo and D'Agostino either of the following:

- 1) Any profit sharing arrangement as existed in United States v. Brick, supra.
- 2) Grezo did not ever accept even a single bet from D'Agostino and hence did not help finance the Ebare-D'Agostino business by helping the latter minimize its risk as in United States v. Schaefer, supra.
- 3) Grezo was not committed to the Ebare-D'Agostino business by any inducement beneficial to Grezo as was the case in United States v. Guzek, supra.
- 4) Grezo did not rely upon any expertise of D'Agostino in the running and operation of Grezo's business as was the case with Dietch in United States v. Guzek, supra.

On the contrary the intercepted conversations are replete with clear indications of Grezo's independence and lack of prior commitment to D'Agostino, his freedom to bet with any other bookmaker of his choice, the freedom by D'Agostino to accept or reject any bet made by Grezo, the lack of a community or concert of interest with respect to the financial well-being of each other's financial success or failure.\*

Except for the fact that Grezo's bets with D'Agostino were substantial and regular, the relationship, even if Grezo was a bookmaker, was not unified or moulded together by any ingredient suggestive of an association any different than that existing between a large scale bettor and his bookmaker.

As the above quoted language in "Guzek", p. 558, would indicate, D'Agostino may have conducted Grezo's business when he helped Grezo insure a profit for himself by agreeing to accept Grezo's bets, but Grezo did not conduct D'Agostino's business which was the charge and the conviction suffered by Grezo.

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\* Since counsel has already extracted from the composite transcript examples of conversations between D'Agostino and Grezo which reflect this independence and lack of concert of interest, counsel will not duplicate here what already appears in the footnotes under that portion of his Brief entitled "Summary of Conversations Between Grezo and D'Agostino." pp. 9-14 of Appellant's Brief.

POINT III

THE TRIAL COURT ERRED IN CHARGING THE JURY THAT A BOOKMAKER CONDUCTS AND PARTICIPATES IN THE OPERATION OF ANOTHER BOOKMAKER'S BUSINESS WHEN HE SYSTEMATICALLY TRANSFERS TO THE LATTER A SUBSTANTIAL AMOUNT OF HIS OWN INDEPENDENT BUSINESS.

The trial Court charged as follows with respect to Grezo's independent bookmaker theory:

"It does not include anyone, including an outside or independent bookmaker who places a single, or isolated bet for his own customers, or who makes isolated and casual, rather than substantial and regular lay-off bets, or who occasionally exchanges line information with the central gambling operation.

"In short, a conductor includes all persons who participates in the operation of a gambling business, including those who . . . , or systematically transfer a substantial amount of business, or part of the action. . . ." (19-20A)\*

The Court rejected Grezo's request to charge as follows:

"In this connection I charge you that the mere placing of lay-off bets by one bookmaker operating his own business with another's gambling enterprise, is not sufficient to weld the two businesses together as one gambling business unless both bookmakers have agreed or do in fact exchange or transfer lay-off bets with each other. Lay-off betting by one bookmaker with a second establishes dependence by the former on the latter at least to the extent that the second help(s) the former in reducing his risk and maintaining a profit from his gambling business. But the absence of trans erring lay-off bets by the second bookmaker with the first, would, at least to this extent negate any inference that the first bookmaker was helping the second bookmaker to reduce his risk and maintain a profit." ( 13A)

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\* Numbers in parentheses followed by the letter "A" refer to pages contained in Appendix.

The intent of Congress in enacting §1955 was to bring federal power to bear against gambling operations organized into a business network and not against small, independent operators; and running through the array of cases dealing with the independent bookmaker theory, is the premise that before an outside or so-called independent bookmaker can be welded to the gambling business of another and to whom the former transfers lay-off bets, there must exist some factor that demonstrates interdependence between the two businesses.

When one bookmaker lays off to another he does so in order to conduct his own business profitably and to this extent it can be said that the accepting bookmaker helps the former to conduct the former's business. As was said in United States v. Guzek, *supra*, at p. 558, this fact does not prove that the transferring bookmaker is conducting the other's business.

This is so especially in the instant case where there was no proof that Grezo in consistently making bets with D'Agostino, did so because he was tied to the Ebare-D'Agostino gambling business by prior arrangement or any other inducement that did not provide him with the freedom to make his bets with a host of other bookmakers.

If, for example, Grezo, having access to at least three other independent bookmakers, unrelated in any way to Ebare-D'Agostino, consistently made lay-offs with each of the others as well as with D'Agostino, can it be said that Grezo conducted all four gambling businesses?

The answer to this question should lie in a more workable definition of the word "conduct" than has heretofore been enunciated by the courts in interpreting §1955. The definition of the word "conduct" should imply a true unity of business interests where each party to the unit is financially interested in the success of the business venture to which the government seeks to tie him as a conductor of that business. The word "conduct" should not be given the interpretation given by the trial court in the instant case. The word "conduct" contained in the statute defining those who violate §1955 should not include a bookmaker who possesses the independence and hence the choice to give or not to give his ~~business~~ to a particular bookmaker to whom the government seeks to join him.

In the instant case the evidence not only failed to establish Grezo's dependence on Ebare'D'Agostino, but in fact demonstrated without question his ability, even with D'Agostino's knowledge and acquiescence, to place his bets elsewhere.

#### POINT IV

THE TRIAL JUDGE ERRED WHEN HE REFUSED TO CHARGE THE DEFENDANT'S "THEORY OF DEFENSE."

At the conclusion of the case against the defendant the Court rejected defendant's request as follows:

"The defendant Charles Grezo's defense has focused on the assertion that his involvement in the gambling

business, which the government claims existed, was that of a bettor, player or customer of the gambling business.

"As such, he asserts, he did not receive or become entitled to receive any profit from his gambling other than personal gambling winnings nor did he render any material assistance to the establishment, conduct or operation of the gambling business.

"In this regard, I charge you that a bettor, customer or player, i.e., one who bets with a bookmaker, and does not receive or become entitled to receive any profit from gambling other than the personal gambling winnings he receives from the bookmaker and who does not render any material assistance to the establishment, conduct or operation of the gambling business, cannot be found guilty of violating §1955 or of a conspiracy to violate §1955.

"Section 1955 of Title 18, U.S.C., prohibiting a person from conducting, financing, managing, supervising, directing or owning a gambling business is directed against the entrepreneurs and organizers of the business, i.e., those persons who receive or become entitled to receive profit, other than personal gambling winnings, from the gambling business and those persons who render material assistance to the establishment, conduct or operation of that gambling business.

"A bettor, player or customer of a gambling business, in spite of his personal winnings received from the gambling business and the monetary contribution he makes to the business when he loses, does not render material assistance to the establishment, conduct or operation of the gambling business. This is so notwithstanding how little or large his monetary bets are with those persons operating the business.

"A bettor, player or customer of a gambling business simply is not within the scope of the statute and does not therefore violate the statute.

"In order to convict Charles Grezo you must find that the evidence is consistent with his participation in the gambling business by engaging in either the conduct, financing, managing, supervising, directing or owning of the gambling business, inconsistent with his participation as a bettor, player or customer of the gambling business, and excluding to a moral certainty every conclusion except the conclusion that he conducted, financed, managed, supervised, directed

or owned all or part of the gambling business.

"You may find that the evidence in this case points only to the conclusion that Charles Grezo's activities were that of a bettor, player and customer of those persons operating or running the gambling business. In such case you shall and must acquit him.

"If you find from the evidence that Grezo's activities were as consistent with his assertion that he was a bettor, player or customer as with the government's assertion that he conducted, financed, managed, supervised, directed or owned all or part of the gambling business, then similarly, I direct that you shall and must acquit him. Such a finding being then consistent with guilt as well as innocence, would establish only a possibility or probability of guilt and hence a possibility or probability of innocence as well. This finding would leave you with the kind of doubt and uncertainty which would require your verdict of acquittal in this case."

This Court has previously held that a defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible. United States v. Alfonso-Perez, 535 F 2d 1362 (2nd Cir., 1976).

In the instant case there was an abundance of evidence that Grezo was a player and not a bookmaker. The entire evidence against Grezo was circumstantial and the jury should have been instructed specifically with respect to the requirement that such evidence must compel the conclusion that Grezo was a bookmaker and not a bettor as a precondition to a guilty verdict; furthermore, the jury should have been instructed that it was necessary for the government to disprove Grezo's defense, that he was a player, beyond a reasonable doubt and to so instruct in the light of the rules that pertain when a jury is asked to

return a verdict of guilty based on circumstantial evidence.

As this Court stated in "Alfonso-Perez," it is some value to a defendant to have the trial judge clearly indicate to the jury what his theory of the case is, and that that theory, if believed, justifies acquittal.

In this case the Court's charge although generally stating that Grezo had no burden of proof, did not make it clear that Grezo had no burden of proving that he was a player or bettor and that it was the government's burden of disproving such defense beyond a reasonable doubt.

The defendant's request which related the law regarding circumstantial evidence pointedly made it applicable to the defense of the defendant and, would, if charged, have concentrated the jury's attention on its mandatory duty to acquit Grezo if there existed any reasonable doubt as to Grezo's status as a bettor.

In view of the paucity of the government's proof concerning Grezo's status as a bookmaker and in view of the concession by the government's own expert that the size or quantity of one's bets does not place that person in the category of a bookmaker, it was reversible error for the Court to refuse this request.

POINT V

IN THE EVENT THAT THE CONVICTION AGAINST MICHAEL BEACH IS REVERSED FOR INSUFFICIENCY, THEN THE CONVICTIONS AGAINST ALL APPELLANTS INCLUDING GREZO, SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

As previously stated, counsel as yet does not have access to the trial transcript. He is therefore unable to recall the evidence against Michael Beach, as one of the six convicted of the substantive violation of §1955. Counsel does recall that counsel for Beach did argue on the trial and will most probably argue on appeal that the evidence against Beach was insufficient to prove his violation of §1955.

This Court's decision with respect to Beach should affect the other appealing defendants, Ebare, D'Agostino and Grezo because of this Court's decision in United States v. Todaro, docket no. 76-1355, dec. February 24, 1977, which reversed the conviction of one whose only involvement in an illegal gambling business contemplated by §1955 was his conduct in providing "line" information to the operators of that business. In view of this decision, the non-appealing defendant, Louis M. Camerano, should not have been counted as one of the necessary five defendants who violated the statute in question. Without Camerano, only five participants are left, including Czerwinski, the other defendant who did not appeal his conviction. A reversal by this Court as to Beach should therefore require a reversal as to the others who along with Czerwinski would number only four against whom the government sought to indict

and did convict.

CONCLUSION

THE DEFENDANT'S CONVICTION SHOULD BE  
REVERSED AND THE INDICTMENT DISMISSED.

Dated: May 2, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-vs-

CHARLES P. GREZO, JOSEPH D'AGOSTINO,  
SAMUEL EBARE and RICHARD MICHAEL BEACH,

Defendants-Appellants.

AFFIDAVIT OF SERVICE  
BY MAIL

Docket No. 76-1449

STATE OF NEW YORK )  
COUNTY OF MONROE ) SS:  
CITY OF ROCHESTER )

JUDITH HOPKINS, being duly sworn, deposes and says:  
deponent is not a party to this action, is over 18 years of age and  
resides at Rochester, New York.

On May 12, 1977, deponent served the within Brief for Appellant Grezo and Appendix for Appellant Grezo upon the United States Attorney for the Northern District of New York at Federal Building, Syracuse, New York, and upon the United States Department of Justice, Jeffrey C. Fisher, Esq., Special Attorney, at 921 Genesee Building, Buffalo, New York, attorneys for the United States in this action, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Judith Hopkins  
JUDITH HOPKINS

Sworn to before me this  
12 day of May, 1977.

Norman A. Palmeri

NOTARY PUBLIC  
Notary Public to the State of New York  
Norman A. Palmeri, N.Y.  
Commission Expires March 30, 1980

